

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5389

996

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA *EX REL.* THE
DELAWARE AND HUDSON RAILROAD CORPORATION,
APPELLANT,

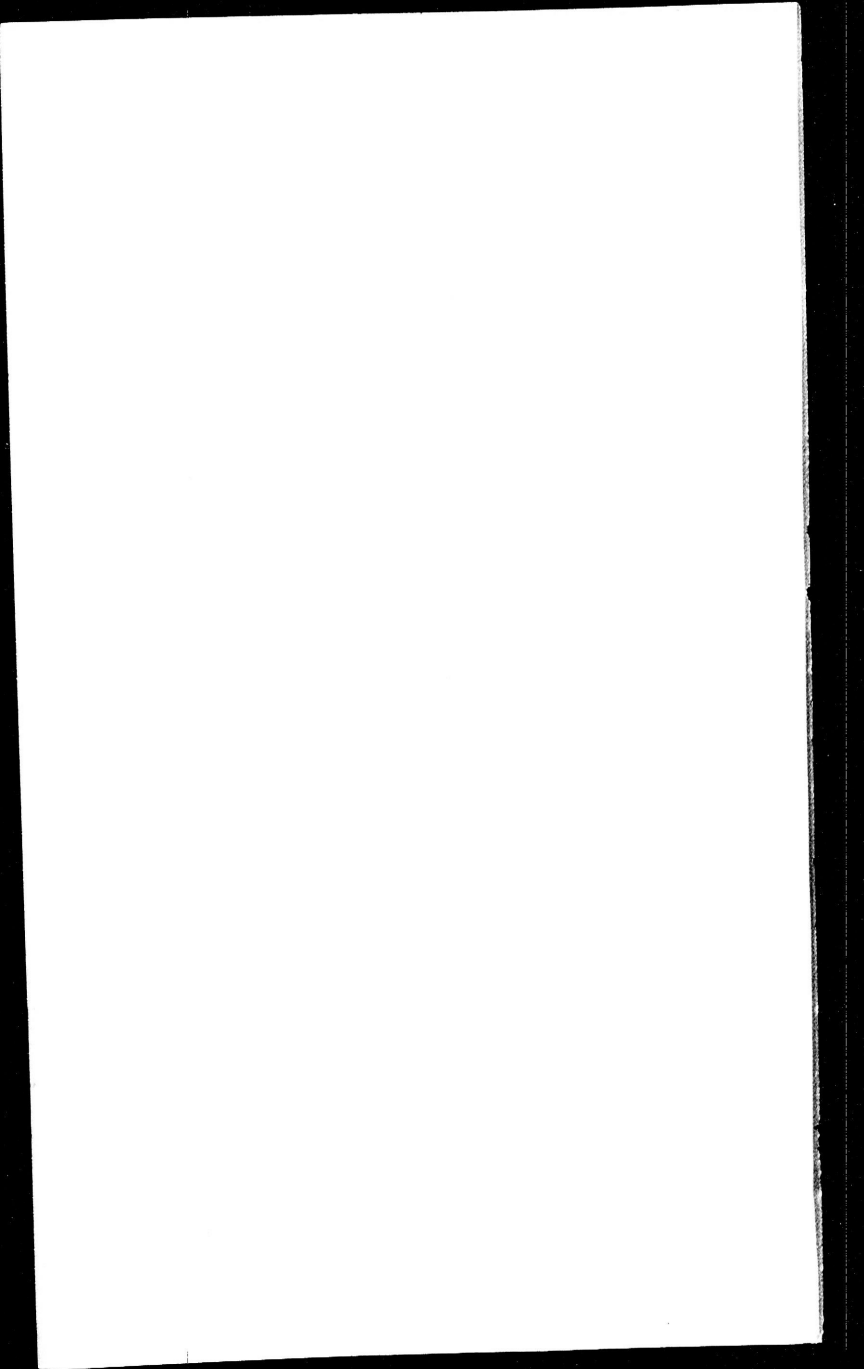
vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 17, 1931.

PRINTED APRIL 21, 1931.



Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5389

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA *EX REL.* THE
DELAWARE AND HUDSON RAILROAD CORPORATION,
RELATOR,

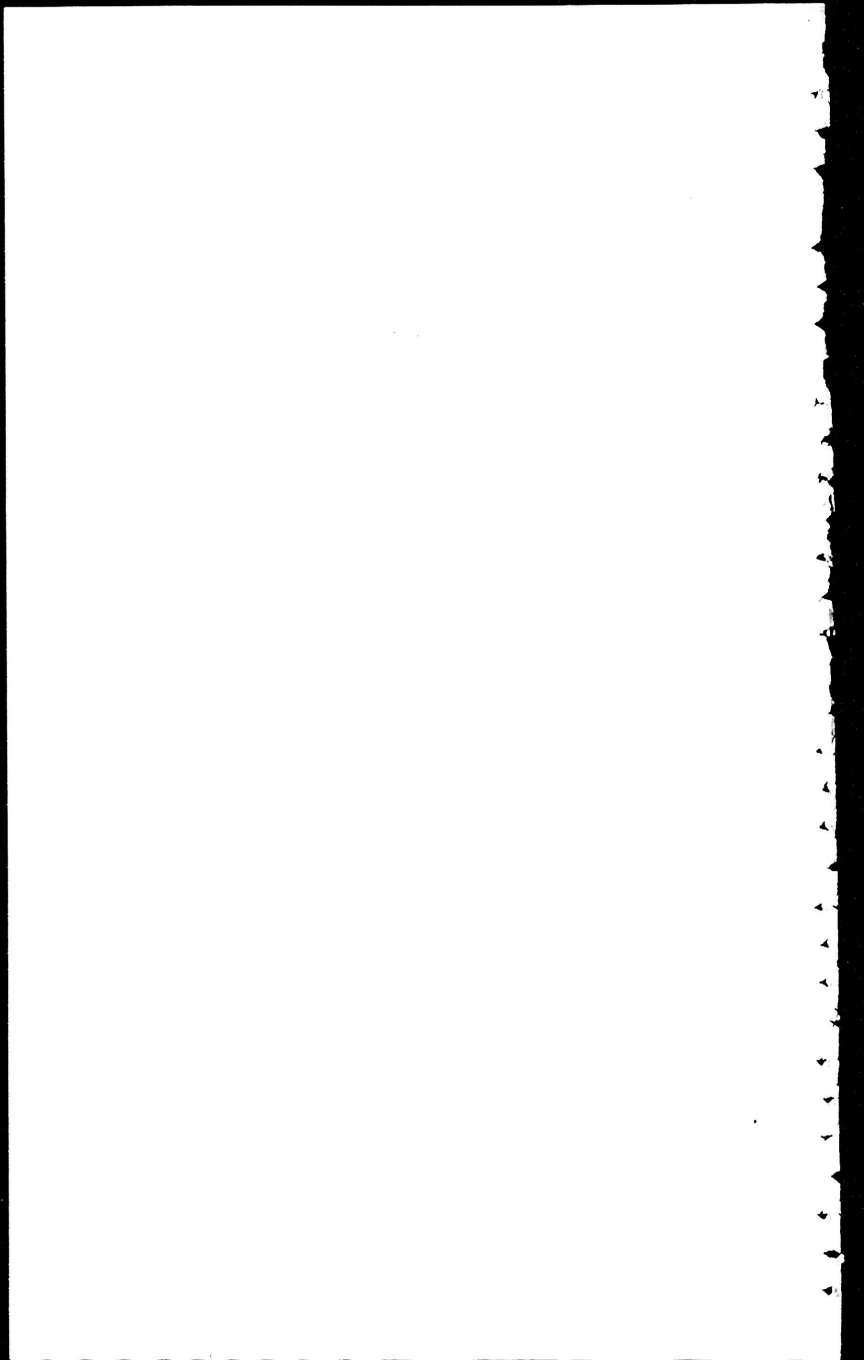
vs.

INTERSTATE COMMERCE COMMISSION,
RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original	Print
Caption	<i>a</i>	1
Petition	1	2
Exhibit "A".....	12	13
Exhibits B ¹ and B ²	19	18
Exhibit "C".....	20	19
Rule to show cause; marshal's return.....	24	22
Return to order to show cause and answer of Interstate Commerce Commission.....	25	23
Order denying prayers of petition, discharging rule to show cause, and dismissing petition; judgment.....	34	29
Memoranda: Appeal noted by relator and penalty of under- taking on appeal fixed; \$50 deposited in lieu of undertak- ing on appeal.....	34	29
Relator's assignment of errors.....	35	29
Designation of record.....	37	30
Order making bill of exceptions part of record.....	38	31
Clerk's certificate.....	39	31
Bill of exceptions.....	40	32
Testimony of F. N. Hiller.....	42	34
Testimony of Henry D. Boynton.....	48	39



Court of Appeals of the District of Columbia

No. 5389.

THE UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

a Supreme Court of the District of Columbia.

At Law.

No. 79212.

THE UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Relator,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

American Glue Case.

Filed February 4, 1931.

In the Supreme Court of the District of Columbia.

At Law.

No. 79212.

THE UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Relator,

against

INTERSTATE COMMERCE COMMISSION, Respondent.

*Application for Writ of Certiorari or Mandamus or
Prohibition.*

To the Supreme Court of the District of Columbia:

Your relator respectfully shows unto this Honorable Court:

I. The relator herein, The Delaware and Hudson Railroad Corporation, is a railroad corporation duly organized and existing under and by virtue of the Railroad Law of the State of New York, having its principal place of business at Albany, in the County of Albany and in the State of New York.

II. The relator is a common carrier engaged in the transportation of persons and property between places in various States of the United States and is subject to the provisions of the Act of Congress of February 4, 1887 (24 Stat. 379), entitled "An Act to Regulate Commerce", and the acts amendatory thereof and supplementary thereto, including the Act of Congress of February 28, 1920 (41 Stat. 456), known as the "Transportation Act of 1920", which Act to Regulate Commerce, as so amended and supplemented, is hereinafter referred to as the "Act".

III. The respondent, Interstate Commerce Commission, is a body organized under and by virtue of the said Act with its principal office in the City of Washington, District of Columbia, where its general sessions are held.

IV. By Section 1 of said Act it is provided that all charges made for any service rendered in the transportation of passengers or property shall be just and reasonable and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

2 By Section 8 a common carrier is made liable in damages to persons injured by reason of anything done, or omitted to be done, by it in violation of said Act; and Section 9 provides that a person claiming to be damaged by a common carrier may either make complaint to the Commission, as provided in the Act, or may bring suit in court. By Section 13, paragraph 1, it is provided as follows with respect to such complaints to the Commission:

“Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.”

By Section 16, paragraphs 1, 2 and 4, it is provided as follows with respect to orders of the Commission awarding damages to such persons and suits for the enforcement of such orders:

“(1) Orders by commission for payment of damages.—If, after hearing on a complaint made as provided in section thirteen of this chapter, the commission shall determine that any party complainant is entitled to an award of dam-

ages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

“(2) Proceedings in courts to enforce orders; costs; attorney’s fee.—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court

3 of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney’s fee, to be taxed and collected as a part of the costs of the suit.

* * * * *

“(4) Joinder of parties; process; judgment.—In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.”

V. The powers and duties of the Commission under the above-quoted sections of the Act are judicial or quasi-judicial in character. With respect to the proceedings before the Commission, Section 17 of the Act provides as follows:

"The commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * The commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the commission, including forms of notices and the service
4 thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States.
* * *,"

VI. On or about the 25th day of July, 1930, there was filed with the respondent Interstate Commerce Commission a certain petition docketed as No. 23728 and entitled "American Glue Company, Baeder Adamson Company, Complainants, against Boston and Maine Railroad and other carriers named in Appendix, Defendants" and a copy thereof was served upon the relator herein. Said petition alleged that the complainant American Glue Company, a Massachusetts corporation, had factories at Springdale, Pennsylvania, and at Peabody, Massachusetts, and that complainant Baeder Adamson Company had a factory at Philadelphia, Pennsylvania, and that all the applicable rates on shipments of glue stock received by the complainants at Springdale, Pennsylvania, Philadelphia, Pennsylvania, and Peabody, Massachusetts, are higher actually and/or relatively than the rates published and applied on numerous commodities of the same or greater value, and are excessive, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act. The petition then set forth the points of origin from which shipments were made to Springdale, Pennsylvania, to Peabody, Massachusetts, and to Philadelphia, Pennsylvania, and prayed for reparations on account of alleged unlawful charges collected on such shipments.

On information and belief, said complainant American Glue Company, a Massachusetts corporation, on or about

October 21st, 1930, transferred its manufacturing plant located at Springdale, Pennsylvania, to American Glue Company, Inc., a Delaware corporation, which latter company is now engaged in the business of manufacturing and selling glue, with a plant at Springdale, Pennsylvania.

On information and belief, said complainant Baeder Adamson Company changed its name to Glue Liquidation Corporation and, prior to September 1st, 1930, sold its business and all other assets, including its factory at Philadelphia, Pennsylvania, to said complainant American Glue Company, a Massachusetts corporation, which latter company, on or about October 21st, 1930, changed its name to Eastern Equities Corporation and is now in the process of liquidation.

Thereafter, and on or about the 17th day of January, 1931, the respondent Interstate Commerce Commission entered an order permitting the said petition, docketed as

5 No. 23728, to be amended, *inter alia*, so as to be entitled "Eastern Equities Corporation, American Glue Company, Inc., Complainants, against Boston and Maine Railroad, and other carriers named in Appendix, Defendants", and so as to eliminate Peabody, Massachusetts, as a point of destination. The points of origin for shipments to Springdale and to Philadelphia set forth in said amended petition, and the claims therein made for reparations on account of rates paid on such shipments, are the same, respectively, as the points of origin, for such shipments, and the claims for reparations, with respect thereto, set forth in said original petition. The list of common carriers named as defendants in the Appendix to said amended petition is the same as that appended to the said original petition.

The relator, together with twenty-six other common carriers by railroad, is named in the list of carriers contained in the Appendix to said amended petition as a defendant therein, and said amended petition was thereafter served upon relator herein. A copy of said amended petition, together with the order permitting the said amendment, is hereto annexed, marked Exhibit "A", and made a part hereof. Said amended petition is hereinafter referred to as the "petition".

VII. Said complainants alleged in said petition that all the rates applicable to shipments of glue stock to Spring-

dale, Pennsylvania, and to Philadelphia, Pennsylvania, from various points of origin in the United States and Canada, named in said petition, were and are higher actually and/or relatively than the rates published and applied on numerous commodities of the same or greater value, and are excessive, unjust and unreasonable in violation of Section 1 of the Act. Maps showing said destinations and points of origin are hereto annexed, marked Exhibits "B¹" and "B²", and made a part hereof. Said complainants demand, among other things, that the said carriers be required to answer the said charges, that they be ordered to cease and desist from said alleged violations and that said carriers be required to pay damages to the said complainants by way of reparations for the alleged unlawful charges assessed on shipments to Springdale and Philadelphia, Pennsylvania.

VIII. Among the points of origin from which shipments are alleged to have been moving, are now moving and/or will in the future move to Springdale, Pennsylvania,
 6 and the rates from which to said destination are complained of in said petition, are the following:

Ashtabula, O.	Little Falls, N. Y.
Baltimore, Md.	Newark, N. J.
Brantford, Ont.	Norwood, Mass.
Buckhannon, W. Va.	Parsons, W. Va.
Buffalo, N. Y.	Portville, N. Y.
Chicago, Ill.	Richwood, W. Va.
Cincinnati, O.	Rochester, N. Y.
Columbus, Ind.	Sault Ste. Marie, Mich.
Conneaut, O.	

Among the points of origin from which shipments moved prior to September 1st, 1930, to Philadelphia, Pennsylvania, and the rates from which to said destination are complained of in said petition, are the following:

Baltimore, Md.	Newark, N. J.
Irvington, N. J.	Portville, N. Y.
Little Falls, N. Y.	Wilmington, Del.
Luray, Va.	

IX. No movement whatsoever of any of said shipments from the points of origin, mentioned in paragraph VIII

above, took place, or can take place, over any railroad system of The Delaware and Hudson Railroad Corporation, the relator herein, either as an originating, intermediate or delivering carrier or otherwise, relator is not a party to, and does not and did not in any manner participate in, any of the rates applying to shipments from said points of origin, relator is in no way concerned or interested in any complaints or alleged causes of action against any of the carriers mentioned in said petition with respect to any rates applying from said points of origin; and with respect to rates upon shipments from said points of origin no complaint or cause of action whatever is or could be stated against the relator herein.

X. Relator, The Delaware and Hudson Railroad Corporation, has served or may in some manner serve as an originating, intermediate or delivering carrier, and participates in joint rates, from the following only of the points of origin which are set forth, and the rates from which are complained of, in said petition:

In the case of shipments to Springdale, Pennsylvania:

Ballston Spa, N. Y.	Morrisville, Vt.
Dover, N. H.	Peabody, Mass.
Lowell, Mass.	Worcester, Mass.

7 In the case of shipments to Philadelphia, Pennsylvania:

Ballston Spa, N. Y.	Peabody, Mass.
Danversport, Mass.	Woburn, Mass.

XI. Relator is advised by its counsel and verily believes that any alleged violations of the Act with respect to rates charged upon shipments from the points of origin mentioned in paragraph VIII hereof are wholly separate and distinct from any alleged violation which relator may have committed either by itself or jointly with other carriers, and relator is in no way concerned with such first-mentioned violations, nor may it properly be involved in any complaint with respect thereto. Said alleged violations relate to different territory, routes and conditions of transportation than the alleged violations with which relator is concerned and involve different parties, subject matter, issues and defenses. Relator is advised by its counsel

and verily believes that evidence concerning the former alleged violations would not be material, relevant or competent with respect to the latter; and that relief could not properly be awarded to said complainants on account of all violations alleged in said petition in a single order.

XII. On or about the 30th day of October, 1930, relator duly made motion before the respondent, Interstate Commerce Commission, in said proceedings for a severance of the complaints, demands and allegations contained in said petition in so far as the same concern rates from the points of origin not served by The Delaware and Hudson Railroad Corporation as aforesaid (set forth in paragraph VIII herein), to the end that the hearing in said proceedings, in so far as they may involve the relator herein, might be conducted in accordance with law and confined to the issues in which relator has an interest, and that the record on said hearing might be free from any and all of the irrelevant, immaterial and incompetent matters concerning the said points of origin in which The Delaware and Hudson Railroad Corporation has no interest whatsoever, and for such other and further relief as the Commission might deem proper in the premises. A copy of said motion is hereto annexed, marked Exhibit "C", and made a part hereof.

XIII. Thereafter, and on or about the 10th day of November, 1930, an order was entered at the general
8 session of the respondent, Interstate Commerce Commission, held at its offices in Washington, D. C., overruling the said motion of the relator for such severance in said proceedings.

XIV. Relator duly answered the complaints contained in said petition, insofar as relator is concerned, and denied that its rates are unjust or unreasonable or in violation of Section One (1) of the Act. On or about the 10th day of December, 1930, the respondent assigned the said case for hearing on January 28, 1931, at ten o'clock A. M., standard time, at the Hotel Statler, Boston, Massachusetts, before Examiner Haden. Thereafter, and on or about the 19th day of December, 1930, such hearing was postponed to a date thereafter to be fixed.

XV. Relator is advised by its counsel and verily believes that the respondent Commission, by reason of the foregoing

and by entertaining for hearing and determination in a single proceeding complaints against relator together with unrelated complaints against other carriers, has proceeded and is proceeding in a judicial or quasi-judicial matter without jurisdiction and in disregard of the provisions of the Act, and in particular of Sections 13, 16 and 17 thereof, and of law.

XVI. Relator is advised by its counsel and verily believes that by reason of the foregoing the respondent is proceeding without jurisdiction; is exceeding its jurisdiction; and has deprived or is about to deprive relator of a right, and has imposed or is about to impose a burden upon it or its property, without due process of law.

XVII. Relator is advised by its counsel and verily believes that the respondent Commission, by reason of the foregoing, is not proceeding to a proper hearing upon a complaint against relator on account of violations of the Act alleged to have been committed or participated in by it, with respect to which it might be ordered to make reparation for injury alleged to have been done to a complainant.

XVIII. Relator is advised by its counsel and verily believes that by reason of the foregoing, the respondent is not conducting its proceedings in such manner as would best, or at all, conduce to the proper dispatch of business and the ends of justice; and the methods of proceeding which it has adopted do not conform as nearly as may be, or at all, to those in use in the courts of the United States; but instead are clearly illegal, unknown to the law, and so essentially irregular as to be contrary to right and justice.

XIX. Relator is advised by its counsel and verily believes that the provisions of the Act hereinabove referred to commit no discretion to the respondent Commission and respondent's duties thereunder are ministerial, and in failing and refusing to sever complaints against relator from complaints against other carriers with which relator has no concern and to proceed separately upon such complaints respectively, respondent has failed and refused to perform mandatory duties.

XX. Relator is advised by its counsel and verily believes that the respondent Commission, in proceeding to a hearing in a single proceeding of complaints against relator to-

gether with unrelated complaints against other carriers, is unlawfully assuming a jurisdiction not conferred upon it by said Act or otherwise by law.

XXI. Said unlawful proceedings, as aforesaid, greatly injure, prejudice, harass and annoy the relator. It is advised by its counsel and verily believes that they would subject relator to the risk of having the questions of the reasonableness of its rates and its liability for damages determined upon evidence not material, relevant or competent upon the complaint made against it; would compel it to incur unreasonable expenditures of time and money in attending hearings before the Commission with respect to complaints against other carriers in which it has no proper concern whatever; and, if an order for damages were made as a result of such hearing, would permit the complainants therein to bring suit against relator to recover the damages awarded against it in any court in which such a suit might be maintained against any of the carriers against which an award for damages was contained in such order.

XXII. Relator is advised by its counsel and verily believes that it has no appeal from or other method of review of the said order denying relator's motion for severance, nor any adequate remedy against said unau-
10 thorized proceedings save only by application to this

Honorable Court for a writ of *certiorari* to bring up the record in the said proceedings, to the end that the same may be reviewed and quashed; or by application for a writ of *mandamus* to compel the respondent to sever the said complaints against relator and to hear and determine said complaints separately from complaints against other carriers to which relator has no relation; or by application for a writ of prohibition to prevent respondent from further proceeding upon such petition without such severance.

XXIII. That no prior application has been made for the relief herein requested.

Wherefore relator prays:

(1) That this Honorable Court grant a rule directed to the respondent to show cause by a time limited in said rule why a writ of *certiorari* or, in the alternative, a writ of *mandamus* or prohibition should not issue as prayed;

(2) That this Honorable Court issue a writ of *certiorari* directing the respondent to certify to this Court the record

in said matter entitled "Eastern Equities Corporation, American Glue Company, Inc., Complainants, against Boston and Maine Railroad and other carriers named in Appendix, Defendants", Docket No. 23728, to the end that the same may be reviewed and quashed;

(3) Or, in the alternative, that this Honorable Court issue to respondent a writ of *mandamus* requiring and commanding the respondent to sever the said complaints against relator and to hear and determine said complaints separately from complaints against other carriers to which relator has no relation;

(4) Or, in the alternative, that this Honorable Court issue a writ of prohibition to prevent respondent from further proceeding upon said petition without such severance;

11 (5) That the relator have such other and further relief as to this Honorable Court may seem just in the premises.

THE DELAWARE AND HUDSON RAIL-
ROAD CORPORATION,

By H. T. NEWCOMB,

Vice-President and General Counsel, Relator.

H. T. NEWCOMB,

32 Nassau Street, New York City;

CHARLES E. HUGHES, JR.,

100 Broadway, New York City;

ROBERT E. QUIRK,

Investment Building, Washington, D. C.,

Attorneys for Relator.

STATE OF NEW YORK,

County of New York, ss:

H. T. Newcomb, being duly sworn, deposes and says:

I am Vice President and General Counsel of The Delaware and Hudson Railroad Corporation and have executed and subscribed the foregoing application on its behalf; I have read the foregoing application and know the contents thereof; that the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

H. T. NEWCOMB.

Sworn to before me this second day of February, 1931.

[Seal of Albert T. Swords, Notary Public, Bronx
County, N. Y.]

ALBERT T. SWORDS,
Notary Public, Bronx County.

Bronx Co. Cl'k's No. 423.

N. Y. Co. Cl'k's No. 1967.

Commission expires March 30, 1931.

12

Filed February 4, 1931.

EXHIBIT "A".

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 17th Day of January, A. D. 1931.

No. 23728.

AMERICAN GLUE COMPANY et al.

v.

BOSTON AND MAINE RAILROAD et al.

Order Permitting Amendment.

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of complainants:

It is ordered, That the complaint in this proceeding be, and the same is hereby, amended in accordance with the document hereto attached, marked "Amended Complaint";

It is further ordered, That a copy of the amended complaint be served upon defendants; and that a copy of this order be served upon each of the parties to this case.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

13 Before the Interstate Commerce Commission.

Docket No. 23728.

EASTERN EQUITIES CORPORATION, AMERICAN GLUE COMPANY,
Inc., Complainants,

v.

BOSTON AND MAINE RAILROAD and Other Carriers Named
in Appendix, Defendants.

Amended Complaint

The amended complaint of the above named complainants respectfully shows:

I. (a) That the American Glue Company, one of the original complainants herein, changed its name on October 21, 1930, to Eastern Equities Corporation; that said Eastern Equities Corporation is a corporation organized and existing under the laws of the State of Massachusetts with its principal office in Boston, Mass., and is now in process of liquidation.

(b) That Baeder Adamson Company, one of the original complainants herein, changed its name on August 7, 1930, to Glue Liquidation Corporation and on August 8, 1930, sold its business and all other assets and properties to American Glue Company, a Massachusetts Corporation, which on October 21, 1930, as stated in the preceding paragraph, changed its name to Eastern Equities Corporation; that thereby the Eastern Equities Corporation became and now is the successor to the Baeder Adamson Company.

(c) That American Glue Company, Inc., is a corporation organized and existing under the laws of the State of Delaware; that on or about October 21, 1930, it acquired from
14 the American Glue Company (a Massachusetts Corporation) its glue manufacturing plant at Springdale, Pa., and is engaged in the business of manufacturing and selling glue, with a plant at Springdale, Pa., and its principal office in Buffalo, N. Y.

II. That the defendants herein named are common carriers engaged in the transportation of property by railroad between points in the several states of the United States and as such common carriers are subject to the provisions

of the Interstate Commerce Act and acts supplementary thereto and amendatory thereof.

III. (a) That in the production of glue at Philadelphia, Pa., prior to September 1, 1930, the predecessor of complainant, Eastern Equities Corporation, used tannery fleshings, tannery offal, hide trimmings- and other kinds of glue stock, other than dry, which was purchased by it and shipped in carloads from various points in United States and Canada, hereinafter named.

(b) That in the production of glue at Springdale, Pa., complainants have been and still are using tannery fleshings, tannery offal, hide trimmings and other kinds of glue stock, other than dry, which has been and is being purchased and shipped in carloads from various points in the United States and Canada, hereinafter named.

IV. That said glue stock is rated fifth class in Official Classification No. 50, I. C. C.-O. C. No. 50, D. T. Lawrence Agent, but is accorded 6th-class rates under exceptions thereto, published in Pennsylvania Railroad I. C. C. No. 200, Agent B. T. Jones' I. C. C. No. 2248 and various other schedules of classification exceptions by which the applicable tariffs of rates are governed; and that said 6th-class rates published in tariffs lawfully filed with the Commission as required by law have been and are being assessed on complainants' shipments of glue stock moving to Springdale and Philadelphia, Pa., except that from Sault Ste. Marie, Mich., to Springdale, Pa., a through rate of 41½ cents per 100 pounds has been assessed.

15 V. That all of the applicable rates referred to in the preceding paragraph on shipments of glue stock received by complainants at Springdale and Philadelphia, Pa., were and still are higher, actually and/or relatively, than the rates published and applied on numerous commodities of the same or greater value, including fertilizer and fertilizer materials, and were and still are excessive, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act.

VI. (a) That the points of origin from which shipments have been moving, are now moving and/or will in the future move to Springdale, Pa., are the following:

Ashtabula, O.
Ballston Spa, N. Y.
Baltimore, Md.

Brantford, Ont.
Buckhannon, W. Va.
Buffalo, N. Y.

Chicago, Ill.	Newark, N. J.
Cincinnati, O.	Norwood, Mass.
Columbus, Ind.	Parsons, W. Va.
Conneaut, O.	Peabody, Mass.
Dover, N. H.	Portville, N. Y.
Little Falls, N. Y.	Richwood, W. Va.
Lowell, Mass.	Rochester, N. Y.
Morrisville, Vt.	Sault Ste. Marie, Mich.
Worcester, Mass.	

(b) That the points of origin from which shipments moved prior to September 1, 1930, to Philadelphia, Pa., are the following:

Ballston Spa, N. Y.	Luray, Va.
Baltimore, Md.	Newark, N. J.
Danversport, Mass.	Peabody, Mass.
Irvington, N. J.	Portville, N. Y.
Little Falls, N. Y.	Wilmington, Del.
Woburn, Mass.	

VII. That during the period of two years preceding April 12, 1930, and since that date complainants have received at Springdale and Philadelphia, Pa., numerous shipments of glue stock as previously described, in carloads, from points named in paragraph V on which they have paid and borne, or on which the shippers have prepaid and complainants have borne, the freight charges computed at the rates herein alleged to have been and to be unjust and unreasonable.

VIII. That by reason of the facts stated in the foregoing paragraph, complainants have been subjected to the payment of rates for transportation which were when exacted and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act and that complainants have been injured thereby to their damage to the extent that said rates exceeded or exceed just and reasonable rates.

IX. That an informal complaint, alleging a violation of the Interstate Commerce Act as herein alleged and seeking reparation on shipments moving from the points of origin named herein to Springdale and Philadelphia, Pa., based on just and reasonable rates, was filed with the Commis-

sion on behalf of the complainants on April 12, 1930, and was assigned Informal Complaint No. 145756.

X. That the changes from the original complaint (as amended) effected by this amended complaint are:

(1) The changing of the names of complainants due to changes which have been made in the names, or the sale or transfer of the business, of the original complainants.

(2) The elimination of Peabody, Mass., as a destination.

(3) The withdrawal of the prayer for reasonable future rates to Philadelphia, Pa., due to the discontinuance of the operation of the plant thereat.

Wherefore complainants pray that defendants may be required to answer the charges herein; that after due hearing and investigation, an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation
17 of fleshings, hide trimmings and other glue stock, (not dry) from the origin points named herein, to Springdale, Pa., in lieu of the rates herein complained of, such other rates as the Commission may deem reasonable and just and also pay to the complainants by way of reparation for the unlawful charges assessed on shipments to Springdale and Philadelphia, Pa., as hereinbefore alleged such sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to as an award of damages under the provisions of said Act for violations thereof and that such other and further order or orders be made as the Commission may consider in the premises.

EASTERN EQUITIES CORPORATION,

By F. W. LYMAN,

Its Vice-President, Boston, Mass.

AMERICAN GLUE COMPANY,
INC.,

By M. C. RITER,

Its President, Buffalo, N. Y.

(Signed) DABNEY T. WARING,

Traffic Consultant, for Complainants,

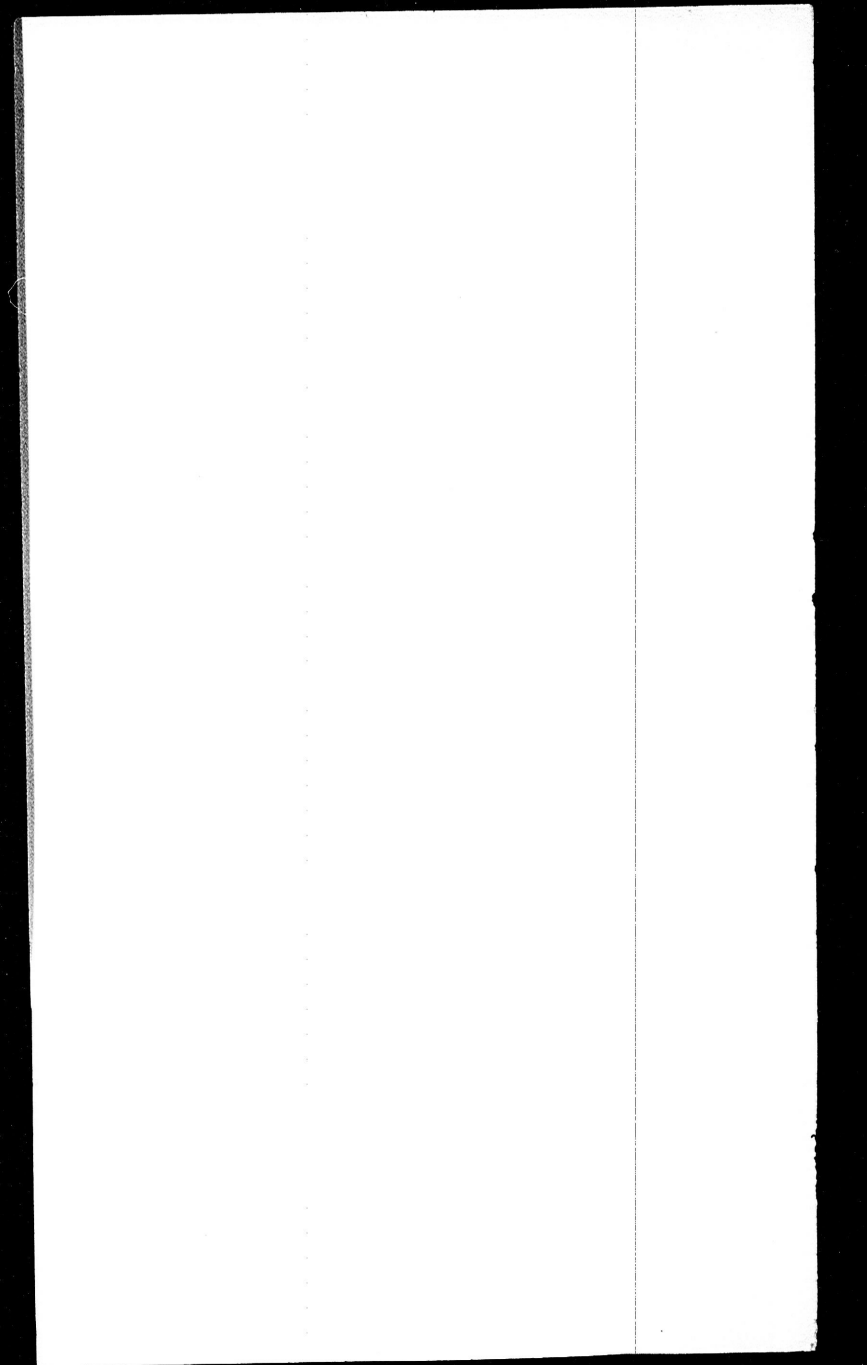
420 Lexington Avenue, New York, N. Y.

Dated at New York, N. Y., January 16, 1931.

APPENDIX.

List of Defendant Carriers.

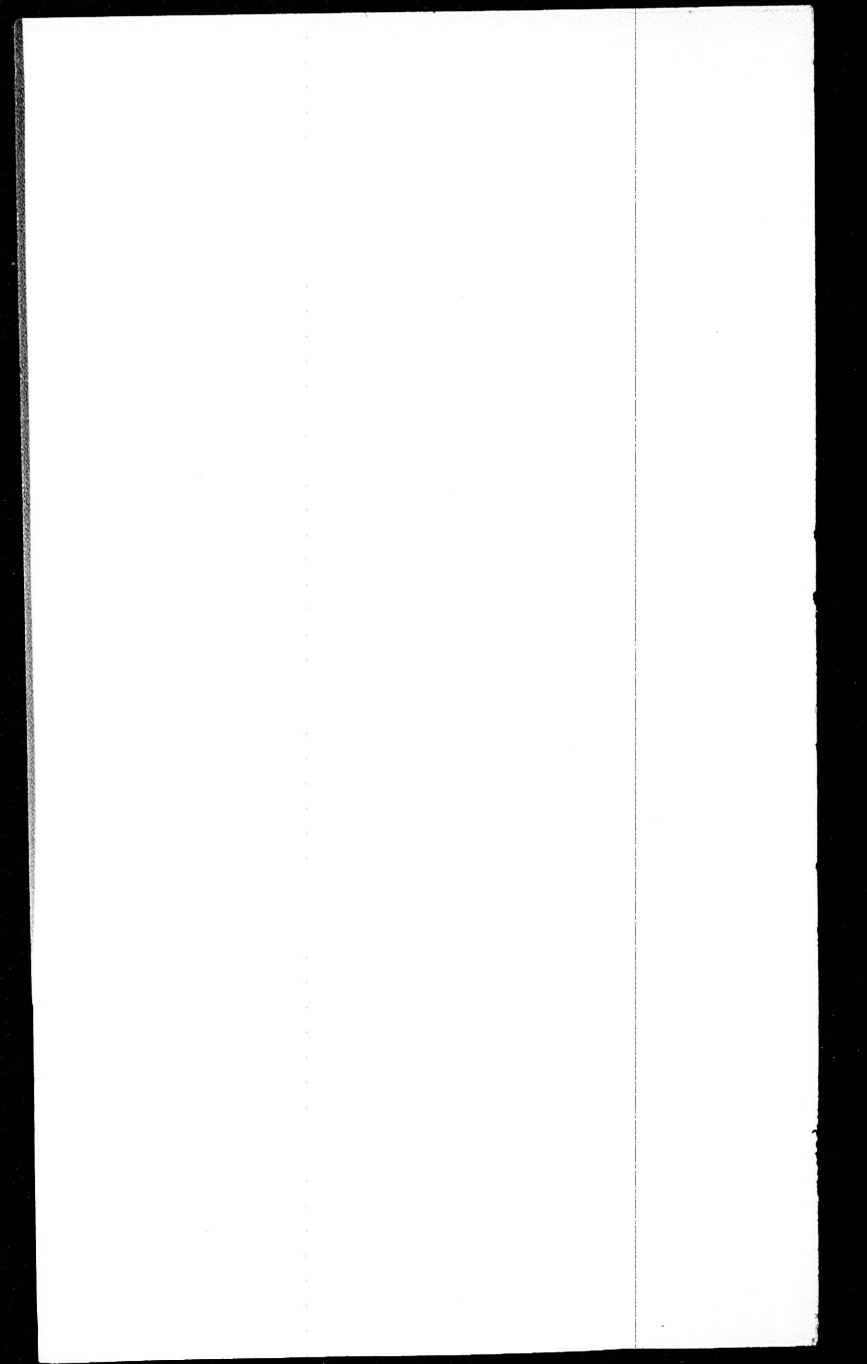
- The Baltimore and Ohio Railroad Company,
Bessemer and Lake Erie Railroad Company,
Boston and Albany Railroad (The New York Central
Railroad Company, Lessee),
Boston and Maine Railroad,
Buffalo & Susquehanna Railroad Corporation,
Buffalo, Rochester and Pittsburgh Railway Company,
Canadian National Railway Company,
Canadian Pacific Railway Company,
- 18 The Central Railroad Company of New Jersey,
The Cleveland, Cincinnati, Chicago and St. Louis
Railway Company (The New York Central Rail-
road Company, Lessee),
- The Delaware and Hudson Company,
The Delaware and Hudson Railroad Corporation,
The Delaware, Lackawanna and Western Railroad Com-
pany,
- The Duluth, South Shore and Atlantic Railway Company,
Erie Railroad Company,
- The Lake Erie and Northern Railway Company,
Lehigh Valley Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway
Company,
- The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The New York, New Haven and Hartford Railroad Com-
pany,
Norfolk and Western Railway Company,
- The Pennsylvania Railroad Company,
Reading Company,
- The St. Johnsbury and Lake Champlain Railroad Com-
pany,
- The Toronto, Hamilton and Buffalo Railway Company,
Western Maryland Railway Company,
West Shore Railroad,
(The New York Central Railroad Company, Lessee)
- (Here follow Exhibits B-1 and B-2, side folio 19.)



APPENDIX.

List of Defendant Carriers.

- The Baltimore and Ohio Railroad Company,
Bessemer and Lake Erie Railroad Company,
Boston and Albany Railroad (The New York Central
Railroad Company, Lessee),
Boston and Maine Railroad,
Buffalo & Susquehanna Railroad Corporation,
Buffalo, Rochester and Pittsburgh Railway Company,
Canadian National Railway Company,
Canadian Pacific Railway Company,
- 18 The Central Railroad Company of New Jersey,
The Cleveland, Cincinnati, Chicago and St. Louis
Railway Company (The New York Central Rail-
road Company, Lessee),
- The Delaware and Hudson Company,
The Delaware and Hudson Railroad Corporation,
The Delaware, Lackawanna and Western Railroad Com-
pany,
The Duluth, South Shore and Atlantic Railway Company,
Erie Railroad Company,
The Lake Erie and Northern Railway Company,
Lehigh Valley Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway
Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The New York, New Haven and Hartford Railroad Com-
pany,
Norfolk and Western Railway Company,
The Pennsylvania Railroad Company,
Reading Company,
The St. Johnsbury and Lake Champlain Railroad Com-
pany,
The Toronto, Hamilton and Buffalo Railway Company,
Western Maryland Railway Company,
West Shore Railroad,
(The New York Central Railroad Company, Lessee)
- (Here follow Exhibits B-1 and B-2, side folio 19.)



Filed Feb 4, 1931

EXHIBIT B¹
SHIPMENTS TO SPRINGDALE
AMERICAN GLUE CO. INC.

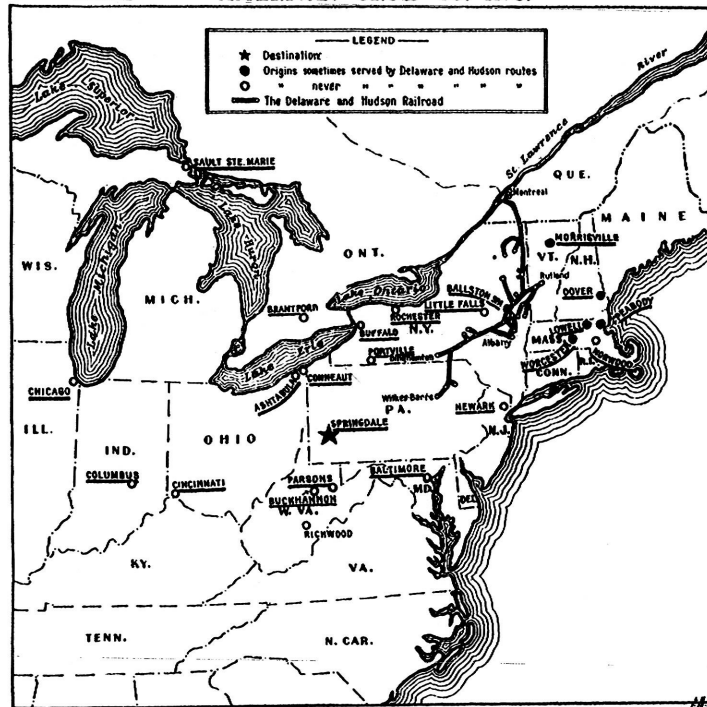
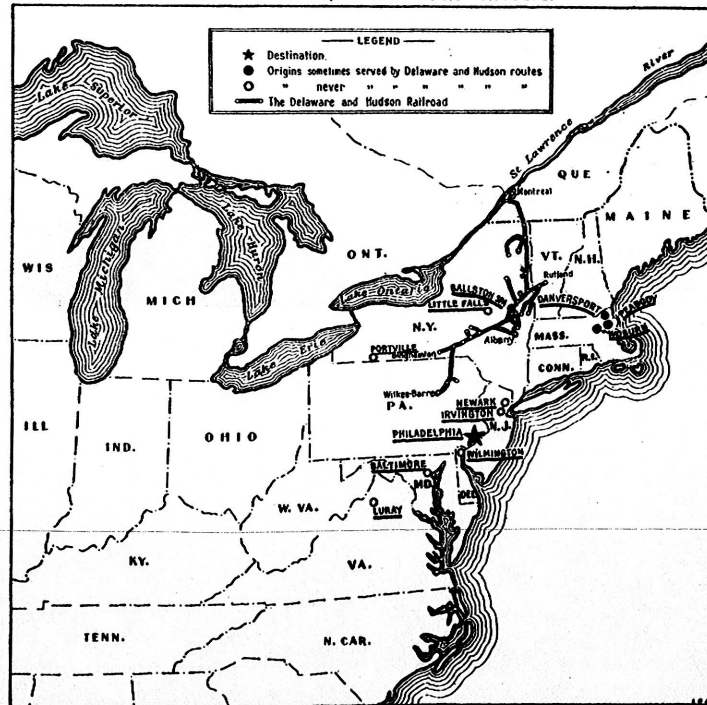
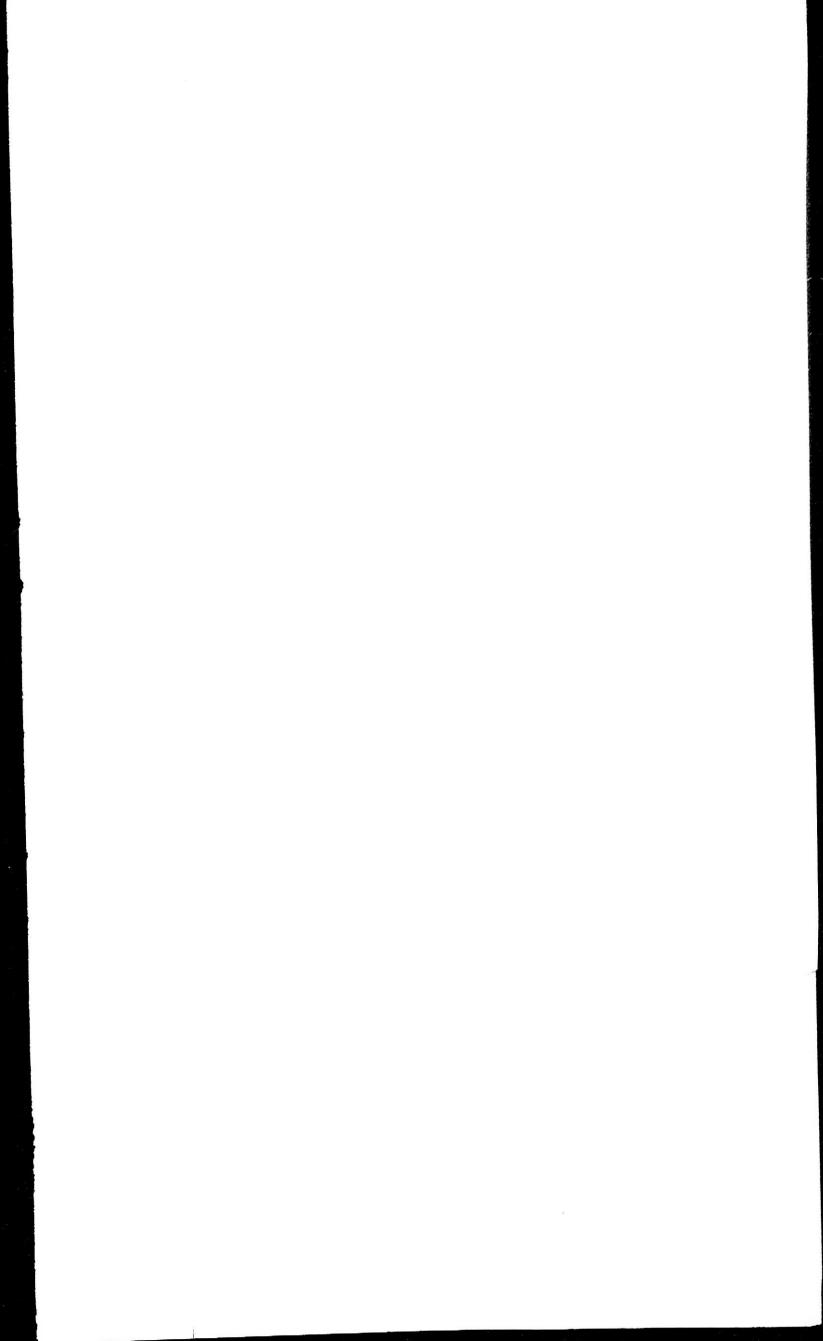


EXHIBIT B²
SHIPMENTS TO PHILADELPHIA
EASTERN EQUITIES CORPORATION



BEST COPY AVAILABLE
from the original bound volume



20

Filed Feb. 4, 1931.

EXHIBIT "C".

Before the Interstate Commerce Commission.

Docket 23728.

AMERICAN GLUE COMPANY et al., Complainants,

v.

BOSTON AND MAINE RAILROAD et al., Defendants.

Motion for Severance.

Comes now The Delaware and Hudson Railroad Corporation, by its attorney, and respectfully moves the severance of the complaint in this proceeding as hereinafter set forth and for the reasons hereinafter indicated. And for grounds of its said motion, said The Delaware and Hudson Railroad Corporation respectfully shows:

I. Paragraph V of said complaint sets forth, among others, points of origins and destinations as follows:

To Springdale, Pennsylvania, from Ashtabula, Ohio; Baltimore, Maryland; Brantford, Ontario; Buckhannon, West Virginia; Buffalo, New York; Chicago, Illinois; Cincinnati, Ohio; Columbus, Indiana; Conneaut, Ohio; Little Falls, New York; Newark, New Jersey; Norwood, Massachusetts; Parsons, West Virginia; Portville, New York; Richwood, West Virginia; Rochester, New York, and Sault Ste. Marie, Michigan.

21 To Peabody, Massachusetts, from Little Falls, New York, and Toronto, Ontario.

To Philadelphia, Pennsylvania, from Baltimore, Maryland; Luray, Virginia; Newark, New Jersey; Irvington, New Jersey; Little Falls, New York; Portville, New York; and Wilmington, Delaware.

II. None of the rates complained of, applying from the origins to the destinations named in the preceding paragraph hereof, is, or could be, applicable to any movement either wholly or in part over the railroad system of said The Delaware and Hudson Railroad Corporation, either

as an originating, intermediate or delivering carrier, or otherwise, and said The Delaware and Hudson Railroad Corporation is in no way involved in any transportation or transaction subject to the Interstate Commerce Act in respect thereto. Nor is said Corporation concerned in any way in any defense that may be made in respect of said rates and transportation.

III. The joinder of defendants is not warranted by Rule II of the Rules of Practice of this Commission which does not authorize, and was not intended to authorize, such joinder of defendants. When the rates of this defendant, or joint rates in which it participates, are brought in issue by a complaint before this Commission, this defendant is entitled to have that issue determined upon a record which contains no testimony that is not competent, material and relevant to that issue. This defendant respectfully protests against being required to participate in any proceeding before this Commission in which its rates of fare or freight, or joint rates of fare or freight in which it participates, are brought in issue and there are also brought in issue in the same proceeding either local or joint rates in which it has no interest, with the result that testimony that is wholly incompetent, irrelevant and immaterial as to all issues in which this defendant is interested cannot be excluded from the record. And this defendant respectfully represents that it cannot lawfully be required to participate in any such proceeding. The rule as to joinder of defendants is stated as follows in *Corpus Juris*:

22 "A joint tort is essential to the joinder of several persons as defendants in an action for tort. * * *"
—47 C. J., 70, Section 146 (3).

"Where the torts committed by the several wrongdoers are separate and distinct, without any concert of action or community of responsibility between them, their liabilities are several only, and they cannot be joined as defendants in an action for the injuries caused thereby, even though the injuries may have been precisely similar in character and inflicted at the same time * * *."—47 C. J., 71, Section 147 (b).

IV. The instant complaint involves a demand for reparation and the question whether the shipper has, in the past, been wronged by the exaction of an unreasonable or dis-

criminatory rate is a judicial function.—*Great Northern Railway Company v. Merchants Elevator Company*, 259 U. S. 285, 291. It is manifest, therefore, that the rules controlling joinder of defendants in courts of law and equity must necessarily be applied in this proceeding, by this Commission. To do otherwise would be to burden this defendant with participation in a record going far outside of the issues in which it has any interest and subject it to the risk of having questions affecting its revenues and its property rights determined upon evidence not competent, material or relevant thereto. This defendant cannot be bound by such incompetent, immaterial and irrelevant testimony, and its inclusion and intermixture in a record on which the issues in which this defendant is interested were determined would render any order thereupon entered void and ineffective.—*The Chicago Junction Case*, 264 U. S. 258, 263; *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 93; *United States v. Abilene and Southern Railway*, 265 U. S. 274, 287-8.

Wherefore:

The Delaware and Hudson Railroad Corporation prays that an order or orders be entered:

A. Requiring the severance of the complaint in so far as the averments and allegations contained therein, relate to rates from the origins to the destinations named in
23 Paragraph I hereof, to the end that a lawful record may be made confined to issues in which this defendant has an interest, free from any and all irrelevant, immaterial and incompetent matters, and

B. For such other and further relief as the Commission shall deem meet and proper in the premises.

Respectfully submitted,

THE DELAWARE AND HUDSON
RAILROAD CORPORATION,
By H. T. NEWCOMB,

Attorney.

The City of New York, Number Thirty-two Nassau Street,
30, October, 1930.

Rule to Show Cause.

Filed February 5, 1931.

* * * * *

Upon the annexed application of The Delaware and Hudson Railroad Corporation, verified by H. T. Newcomb its Vice President, on the 5 day of February, 1931, it is

Ordered that the above named respondent, Interstate Commerce Commission, show cause at a session of this Court to be held in the Court House of the Supreme Court of the District of Columbia in the City of Washington, on the 20th day of February, 1931, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why the prayers of said application for a writ of *certiorari* or in the alternative a writ of *mandamus* or prohibition should not be granted.

Sufficient reason appearing therefor, let service of this order, and the papers upon which it is granted, on the respondent on or before the 7 day of February, 1931, be deemed sufficient.

Dated Washington, February 5, 1931.

F. L. SIDDON,
*Justice of the Supreme Court
of the District of Columbia.*

(Marshal's Return.)

Served the above named respondent Interstate Commerce Commission by serving George B. McGinty Secretary of the said commission Personally Feby. 9, 1931.

EDGAR C. SNYDER,
*U. S. Marshal in and for
the Dist. of Columbia,*
By C. G. COWLEY,
Deputy U. S. Marshal.

K.

Copy

25 *Return to Order to Show Cause and Answer of
Interstate Commerce Commission.*

Filed February 26, 1931.

* * * * *

Comes now the Interstate Commerce Commission (hereinafter called the Commission), now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, by way of return to the rule to show cause, issued herein, and for answer to so much or such parts of the petition as it is advised that it is material for it to answer, answers and says:

1. Answering the opening paragraph and paragraphs I to V, inclusive, of the relator's petition herein, the Commission admits the truth of the allegations therein contained, except that it denies that in any of its acts done by it in connection with the proceeding referred to in the relator's petition it acted in a judicial capacity or as a part of the judicial system of the United States.

26 2. Answering paragraphs VI to XV, inclusive, of the relator's petition, the Commission admits and alleges that on or about the 25th day of July, 1930, the American Glue Company and Baeder Adamson Company filed with it a certain complaint against the Boston & Maine Railroad, the Delaware & Hudson Railroad Corporation, and certain other railroad carriers, alleging that the freight rates established by the said railroads upon shipments between certain designated points were higher, actually and/or relatively, than rates on certain other commodities, and were excessive, unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and praying that the defendants named therein be required by order of the Commission to cease and desist from violating the Interstate Commerce Act by the charging of such unlawful and unreasonable rates, and to establish and put in force and effect, and apply *in futuro*, in lieu of the rates complained of, such other rates as the Commission might

find to be reasonable and just, and that defendants be ordered to pay complainants by way of reparation for the unlawful charges collected such sum as the Commission should determine from the evidence that the complainants were entitled to as an award of damages under the Interstate Commerce Act. The Commission in due course docketed the complaint as *American Glue Company, Baeder Adamson Company, complainants v. Boston & Maine Railroad et al., defendants*, No. 23728, and served copies of said complaint upon all of the defendants named therein, including the relator in this case, with notice to defendants to satisfy the complaint as stated, or to answer the same in writing within 20 days from the date of the notice. That

thereafter, on or about September 25, 1930, the complainants by leave of the Commission filed an amendment to their complaint hereinabove mentioned, in which they alleged that the defendants named in said complaint were common carriers of interstate commerce subject to the orders of the Commission and to the provisions of the Interstate Commerce Act. That thereafter, on or about September 17, 1930, the Delaware & Hudson Railroad Corporation, relator herein, filed its answer to the complaint above described, in words and figures as follows:

Answer of Delaware & Hudson Railroad Corporation.

This defendant denies that its rates are unjust and unreasonable in violation of Section one (1) of the Interstate Commerce Act wherefore it prays that this complaint be dismissed and no reparation granted in so far as it is concerned.

The Commission further admits and alleges that on or about October 30, 1930, the relator filed with the Commission its motion for severance, a true copy of which is attached to the relator's petition, marked Exhibit C and made a part thereof; that in and by said motion, which was not verified, the relator herein, as a defendant in said Commission proceeding, admitted that it participated in shipments between certain of the points named in the complaint but alleged that it had no part in the transportation of complainants' shipments between certain other points named

in said complaint, and moved that the Commission make its investigation and hear the case with respect to rates and shipments in which relator alleged it was interested, separately from its investigation and hearing with respect to rates and shipments in which the relator alleged that it was not interested.

That on or about November 10, 1930, the Commission overruled said motion of the relator and in due course assigned the complaint as presented to one of its attorneys-examiners for investigation and the hearing of evidence.

That subsequently, on or about January 17, 1931, the Commission by order permitted the filing of an amended complaint in the proceeding before it, the effects of which amended complaint were: (1) To change the names of the complainants to conform to changes which had been made in the corporate names of certain complainants and in the ownership of the business and assets of the original complainants; (2) to eliminate Peabody, Mass., as a destination involved in the complaint; and (3) to withdraw the prayer of the original complaint for future reasonable rates to Philadelphia, Pa. Aside from the above-stated changes the amended complaint was substantially the same as the original complaint hereinabove described, and the same railroad companies were named as defendants therein and included the relator herein. That for further information relative to said amended complaint the Commission respectfully refers the court to a copy thereof attached to the petition of the relator herein as Exhibit A thereto.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said paragraphs of the petition.

29 3. Answering paragraphs XVI to XXII, inclusive, of the petition, the Commission denies the truth of the allegations therein contained.

Further answering the petition herein, the Commission says that its procedure with reference to complaints made to it is prescribed by Section 13 (1) of the Interstate Commerce Act in the following language:

Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the

provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

that the procedure prescribed does not include a motion for severance, but that pursuant to the statute above quoted, it became the duty of the Commission upon the filing of the amended complaint (Exhibit A to the petition herein) to investigate the matters complained of therein, including the existence and reasonableness of the rates charged by all the railroads made defendants in said amended complaint for shipments between all the points of origin and destination in said amended complaint alleged, and the Commission does not know and cannot know until it has made its said investigation just what shipments, from what points of origin to the named points of destinations can or would move over the lines of the relator, or what rate schedules are or were applicable to shipments over relator's lines; that it was and is the
30 duty of the Commission to determine what evidence which may be adduced by the respective parties is relevant as distinguished from that which is irrelevant to the issues as to each particular defendant, and to conform its action and any order which it may make as to any particular defendant to the evidence relevant to such defendant.

Further answering the allegations of the petition herein, the Commission says that the relator in presenting its motion for severance (Exhibit C to the petition herein) did

not adduce or offer to adduce proof in support of the allegations of fact set out in its motion, but that in the investigation and hearings which the Commission is required by law to conduct with respect to the allegations of said amended complaint, the relator will be entitled by law to a full opportunity for the introduction of proof of the truth of said allegations in the course of said investigation.

Further answering the petition herein, the Commission says that all its actions in the premises have been entirely within its jurisdiction; that it has not exceeded its jurisdiction; that it has not deprived relator of any legal right nor imposed any unlawful or illegal burden upon the relator or relator's property without due process of law; and that it has conducted and is conducting its proceedings in this case in a manner legal, regular and in full accord with right and justice.

The Commission further states that under the law it is authorized and empowered to make rules for the transaction of its business and for the conducting of investigations pursuant to complaints made to it; that it is empowered by law with discretion to refuse to sever its investigation and hearing under the complaint as filed and is authorized and empowered to determine in a single proceeding all
31 the issues that may be raised by the amended complaint, and it states that the said proceeding before it will not inflict upon, or subject the relator to, any legal injury.

Further answering the allegations of the petition, the Commission says that paragraph 4 of Section 16 of the Interstate Commerce Act provides for suits to enforce orders of the Commission making awards of damages and reads as follows:

Joinder of parties; process; judgment.—In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process

against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

The Commission further states that under the law any order made by it for the payment of reparation would constitute only *prima facie* evidence of the right of complainant to recover such reparation, and that, therefore, the making of an order of reparation by the Commission would constitute no irreparable injury, or any legal injury against the relator. The Commission further says that the proceedings of the Commission are not subject to review by this court upon writ of certiorari; that mandamus would not lie to compel the Commission to sever and separate the proceeding before it, and that writ of prohibition should not issue to prevent it from proceeding upon said amended complaint.

32 All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that the rule issued herein be discharged and that the relator's petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By NELSON THOMAS,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel, of Counsel.

33 CITY OF WASHINGTON,
District of Columbia, ss:

Ezra Brainerd, being duly sworn, says that he is a member and Chairman of the Interstate Commerce Commission, the respondent above named, and that he makes this affidavit on behalf of said Commission; that he has read the foregoing return and answer and knows the contents thereof, and that the same are true.

EZRA BRAINERD, JR.

Subscribed and sworn to before the undersigned, a notary public, within and for the District of Columbia, this 26th day of February, 1931.

[SEAL.]

EUGENIA W. SUTER,
Notary Public.

34 Supreme Court of the District of Columbia.

Tuesday, March 10th, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

By Chief Justice Wheat.

Come now the parties to the above-entitled cause, by their respective attorneys of record, and thereupon this cause comes on for hearing upon the petition of the relator filed herein, the rule and order to show cause issued thereon, the return to rule and order to show cause and answer of the respondent filed herein, the relator's traverse and joinder of issue filed herein and all other proceedings, and after evidence was taken in open court the cause was argued by the respective attorneys and submitted to court. Whereupon it is upon consideration thereof adjudged and ordered that the prayers of said petition be and they are hereby denied; that the rule to show cause be and the same is hereby discharged, and the relator's petition dismissed; that the relator take nothing by its action; that respondent go hence without day, be for nothing held and recover of the relator its costs of defense to be taxed by the Clerk, and have execution.

Memoranda.

March 13, 1931.—Appeal noted by Relator, and penalty of Undertaking on Appeal fixed at \$100—or \$50 in lieu thereof.

\$50 deposited in lieu of Undertaking on Appeal.

35 *Relator's Assignment of Errors.*

Filed April 11, 1931.

* * * * *

Now comes the relator in the above entitled cause and makes and files the following assignment of errors upon

which it will rely upon its prosecution of the appeal in the above entitled cause from a judgment entered by this Honorable Court on the 10 day of March 1931, and shows that in the proceeding, record and judgment in the above entitled cause there was manifest error in the following respects:

1. The court erred in discharging the rule to show cause herein and dismissing relator's application herein for a writ of certiorari, or, in the alternative, for a writ of mandamus or a writ of prohibition.

2. The court erred in denying the prayers of the relator in said application herein.

3. The court erred in refusing to issue a writ of certiorari as prayed for in said application.

4. The court erred in refusing to issue a writ of mandamus as prayed for in said application.

5. The court erred in refusing to issue a writ of prohibition as prayed for in said application.

Wherefore said relator prays that said judgment of said Supreme Court of the District of Columbia may be reversed and that said court be directed to grant such other and further relief as may seem proper.

THE DELAWARE AND HUDSON RAILROAD
CORPORATION,

By H. T. NEWCOMB,
CHARLES E. HUGHES, JR.,
ROBERT E. QUIRK,
ROBERT E. QUIRK,

Its Attorneys.

Service accepted.

NELSON THOMAS,

Attorney for Interstate Commerce Commission.

37

Designation of Record.

Filed April 13, 1931.

* * * * *

Now comes the United States of America, ex rel. The Delaware and Hudson Railroad Corporation, relator in the above entitled cause and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely

- (1) Relator's petition, with exhibits attached thereto.
- (2) The court's rule to show cause; with evidence of service thereof.
- (3) Answer of respondent.
- (4) Judgment of court of March 10, 1931 discharging rule and dismissing petition.
- (5) Bill of exceptions and stipulation of counsel relative to narrative of testimony and use of Rules of Practice Before the Commission.
- (6) Note of appeal in open court and action of court fixing appeal bond and authorizing deposit in lieu thereof, and docket entry showing such deposit.
- (7) Assignment of errors.
- (8) This designation.

ROBERT E. QUIRK,
Attorney for Relator.

Service of above designation accepted this 13th day of April, 1931.

NELSON THOMAS,
Attorney for Respondent.

38 Supreme Court of the District of Columbia.

By Chief Justice Alfred A. Wheat.

Tuesday, April 14, 1931.

Now comes the Relator herein and presents its Bill of Exceptions in the above-entitled cause, and prays that the same may be signed and made of record, *nunc pro tunc*, which is accordingly done.

39 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record, according to directions of counsel, herein filed, copy of which is made part of this transcript, in cause No. 79212 at Law, wherein The United States of America *ex rel.* The Delaware and Hudson Rail-

road Corporation is Relator and Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of April, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

40 Supreme Court of the District of Columbia.

At Law.

No. 79212.

UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Relator,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

Bill of Exceptions.

Be it remembered that at the trial of this case before Mr. Chief Justice Wheat on March 6, 1931, F. N. Hiller and H. D. Boynton, being first duly sworn testified on behalf of relator on direct examination and on cross-examination in substance as shown in the narrative of the evidence attached hereto and made a part hereof all of which has been agreed to by opposing counsel.

The foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of relator and respondent.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the court, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the relator may have its case reviewed on appeal, the relator by its attorney moves the court to sign and seal this, its bill of exceptions, to have the same force and effect as if each and every one of said exceptions

40½ had been separately signed and sealed which motion is granted by the court; and thereupon the relator tenders this, its bill of exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 14th day of April, 1931.

ALFRED A. WHEAT,
Chief Justice.

Approved:

ROBERT E. QUIRK,
Attorney for Relator.
NELSON THOMAS,
Attorney for Respondent.

41 Supreme Court of the District of Columbia.

At Law.

No. 79212.

UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Relator,
vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

Stipulation.

There having been offered certain evidence in this proceeding, now for the purpose of reducing the record on appeal the parties, by their respective counsel, stipulate:

That the attached narrative statement of testimony constitutes a true and correct transcript in condensed form of all of the testimony offered and received in evidence in this case, and

That respondent's exhibit No. 2 referred to in said narrative, being a printed copy of "Rules of Practice Before the Commission", because of its volume is not copied therein, but it is agreed between the parties by their respective counsel that said rules shall be deemed before the court and that either side may refer to and quote therefrom, and for this purpose five copies will be supplied to appellate court.

H. T. NEWCOMB,
CHARLES E. HUGHES, Jr.,
ROBERT E. QUIRK,
Attorneys for Relator.
NELSON THOMAS,
Attorney for Respondent.

April 10, 1931.

5-5389a

42 Supreme Court of the District of Columbia.

At Law.

No. 79212.

UNITED STATES OF AMERICA ex Rel. THE DELAWARE AND
HUDSON RAILROAD CORPORATION, Relator,

VS.

INTERSTATE COMMERCE COMMISSION, Respondent.

Washington, D. C., Friday, March 6, 1931.

The above-entitled matter came on for hearing before
Honorable Chief Justice Wheat at 10 o'clock a. m.

Appearances:

Mr. Charles Evans Hughes, Jr., Mr. H. T. Newcomb, and
Mr. Robert E. Quirk, appearing for Relator.

Mr. Nelson Thomas, appearing for Respondent.

Proceedings.

Mr. Hughes: These are proceedings for writs of cer-
tiorari, or in the alternative, for mandamus or prohibi-
tion.

F. N. Hiller, being called as a witness on behalf of relator
and being first duly sworn, was examined and testified as
follows:

Direct examination.

By Mr. Hughes:

Mr. Hughes: If the Court please, this proof is being
taken in No. 79212, at Law.

43 The Witness: My name is F. N. Hiller. My resi-
dence is Delmar, Albany County, State of New
York. I am assistant general freight agent of The
Delaware and Hudson Railroad Corporation. For the past
several years my duties have been largely confined to the
preparation and presentation of complaints before the In-
terstate Commerce Commission and various State Commis-

sions. My duties have occasioned my attendance at hearings before the Interstate Commerce Commission. I have read the amended complaint in a certain proceeding before the Interstate Commerce Commission, No. 23728, entitled American Glue Company, et al. vs. Boston & Maine Railroad Company, et al.

(The respondent by its attorney objected to the introduction of any evidence bearing upon the truth of the allegations of the complaint before the Commission (Exhibit A to the petition herein) as incompetent, irrelevant and immaterial, for the reason that the relator had not presented such evidence to the Commission, which objection being by the court overruled, the respondent by its attorney then and there duly excepted.)

Mr. Hughes: This proof that is now being offered is in support of Paragraph IX, appearing on page 6 of our petition * * * We are offering this evidence, not on the application as far as it requests certiorari, but on the application as far as it requests mandamus, and, as to the taking of evidence in mandamus, it is fully covered by sections 214, 215 and 216 of the Code of the District of Columbia.

The Witness: The railroad of The Delaware and Hudson Railroad Corporation extends from Plymouth, near Wilkes-Barre in Lucerne County, Pa., to Rouse's Point on the northern boundary of the State of New York,
44 with branch lines in Pennsylvania and New York, and in the western portion of Vermont, and is wholly located in the northwestern portion of Pennsylvania, in the eastern and northern portion of New York, traversing principally the Susquehanna, the Hudson and Champlain valleys in the State of New York, and in that portion of Vermont adjacent to the New York boundary, and extending nor further north than Rutland, Vermont.

The Delaware and Hudson Railroad connects at Wilkes-Barre with the railroads of the Pennsylvania Railroad Company, the Lehigh Valley and the Central Railroad of New Jersey. At Carbondale, Pa., with the Erie Railroad, and the New York, Ontario & Western Railway; at Scranton, Pa., with the Delaware, Lackawanna & Western Railway and the Erie Railroad; at Binghamton, N. Y. with the Delaware, Lackawanna & Western and the Erie Rail-

roads; at Owego, N. Y., with the Lehigh Valley; at Sidney, N. Y., with the New York, Ontario & Western; at Albany, N. Y. with the New York Central Railroad and the Boston & Albany Railroad; at Schenectady, N. Y. with the New York Central Railroad; at Mechanicville, N. Y. with the Boston & Maine Railroad; at Rutland, Vt. with the Rutland Railroad; and at Rouse's Point, N. Y., with the Rutland Railroad and the Canadian National Railways and the Napier Valley Junction Railway, the Napier Valley Junction Railway furnishing a short connection between the railroad of The Delaware and Hudson Railroad Corporation and the railroad of the Canadian Pacific.

The Delaware and Hudson also connects at other junctions with some of the carriers named and with other railroads and carriers, and it interchanges freight in
45 interstate commerce at all named junctions. Its principal points of interchange are Wilkes-Barre, Binghamton, Schenectady, Mechanicville and Rouse's Point.

The principal and characteristic function of The Delaware and Hudson Railroad as a carrier of freight in interstate commerce, is to transport anthracite mined in Luzerne and Lackawanna Counties, Pennsylvania, at mines adjacent to its railroad, northward for delivery at points on its own railroad, and to its connections for delivery in northern New York, New England and Canada; and also to act as delivering, intermediate or bridge carrier in the transportation of freight received from its connections at Rouse's Point, Rutland, Mechanicville, Albany, Sidney, Owego, Binghamton, Carbondale, Scranton and Wilkes-Barre to points on its own line or to points where said freight is delivered to its connections, and to transport freight originating on its own line either to points of delivery on its own line or to such junctions for delivery to its connections.

The New York Central Railroad crosses the line of the Delaware and Hudson Railroad at Schenectady, N. Y., and at Albany, N. Y. and from points both east and west of the points named, has its own routes and rates applicable over those routes, enabling it to handle freight between origins and destinations covered by those rates, in which rates and in which routes the Delaware and Hudson has no part, does not concur, does not participate in the movement of

the traffic, nor can it participate in the movement of the traffic, due to the lack of rates applicable via its routes.

(Respondent by its counsel objected to the questions to which the above statements were answers and to
46 said answers, as incompetent, irrelevant and immaterial, which objections being in each instance overruled the respondent excepted.)

Paragraph VI of the amended petition before the Commission sets forth the following points of origin from which shipments have been moving or will in the future move to Springdale, Pennsylvania, Ashtabula, Ohio, Baltimore, Md., Brantford, Ontario, Buckhannon, West Va., Buffalo, N. Y., Chicago, Ill., Cincinnati, O., Columbus, Ind., Conneaut, O., Little Falls, N. Y., Newark, N. J., Norwood, Mass., Parsons, W. Va., Portville, N. Y., Richwood, W. Va., Rochester, N. Y., Sault Ste. Marie, Mich. Those points of origin are all located south or west of the southern and western termini of The Delaware and Hudson Railroad, with the exception of Norwood, Mass. Norwood, Mass. is situated east of the line of The Delaware and Hudson Railroad.

Paragraph VI also sets forth the following points of origin concerned in shipments to Philadelphia, Pennsylvania, Baltimore, Md., Irvington, N. J., Little Falls, N. Y., Luray, Va., Newark, N. J., Portville, N. Y., Wilmington, Del. Those points of origin are all located south or west, respectively, of the southern or western termini of The Delaware and Hudson Railroad. The points of destination are located as follows: Springdale, Pa. is southwest of the southern terminus, and Philadelphia, Pa. is generally southeast from the southern terminus.

(Mr. Hughes, attorney for the relator, asked the following question: "Is it possible for the Delaware and Hudson to participate in transportation of glue stock or any freight between the points above mentioned and Springdale or Philadelphia" to which question the respondent by
47 its counsel objected on the ground of incompetency, irrelevancy and immateriality; said objection being by the court overruled the respondent, by its counsel, duly excepted.)

The Delaware and Hudson Railroad can participate in the movement of glue stock from Ballston Spa, N. Y., Auburn, N. Y., Lowell, Mass., Morrisville, Vt., Peabody, Mass., and Worcester, Mass., to Springdale, Pa.; and from Ballston Spa, N. Y., Peabody and Woburn, Mass., to Philadelphia, Pa., but it cannot participate in transportation of glue stock and freight from any of the other points.

The Delaware and Hudson Railroad Corporation and its predecessor has never participated in transportation from the points involved, with the exceptions which I have mentioned in my last answer.

To my knowledge there are not nor have there ever been any rates to which The Delaware and Hudson Railroad Corporation, or its predecessor, is or was a party that are or were applicable to glue stock or any other commodity or passengers between any of the points mentioned in paragraph VI of this petition, with the exceptions I have stated.

Norwood, Mass., is located in the extreme easterly part of the State of Massachusetts, on the line of the New York, New Haven & Hartford Railroad, east of the line of The Delaware and Hudson Railroad, of course.

There are no rates on glue stock or other freight from Norwood to either Springdale or Philadelphia, Pa. published to apply via The Delaware and Hudson Railroad as a participating carrier.

(The respondent by its counsel objected to the questions to which the above four paragraphs state in substance the answers of the witness, and also to said answers, as incompetent, irrelevant and immaterial; which objections being in each instance overruled, the respondent excepted.)

I have examined the maps which are annexed to the petition in this proceeding, and marked Exhibits B-1 and B-2, and they are substantially accurate representations of what they purport to show.

Cross-examination.

By Mr. Thomas:

I have not testified before the Commission in the proceeding which has been referred to in my testimony, namely, that of American Glue Company v. Boston & Maine Railroad, et al., Docket No. 23728, giving the Commission

the information relative to the geographical locations, connections, rates and routes concerning which I have just testified here.

(Witness excused.)

Henry D. Boynton was called as a witness on behalf of relator and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hughes:

My name is Henry D. Boynton. I am an attorney at law and am employed in the law department of The Delaware and Hudson Railroad Corporation, with offices at 32 Nassau Street, New York City. My duties consist principally in the defense of complaints before the Interstate Commerce Commission and State commissions against The Delaware and Hudson Railroad Corporation, involving rates, rules, practices and regulations as it participates in state and interstate commerce. In the performance of those duties I am required to attend hearings, examine witnesses, prepare answers, motions, briefs and other duties of that character. I have read the complaint, and am familiar with the issues, record and proceedings before the Interstate Commerce Commission in a proceeding there pending, No. 23728, entitled American Glue Company, et al. vs. Boston & Maine Railroad Company, et al.

The Delaware and Hudson proposes to defend the rates, which are involved in that proceeding from Ballston Spa, N. Y., Dover, N. H., Lowell, Mass., Morrisville, Vt., Peabody, Mass., and Worcester, Mass., to Springdale, Pa., and from Ballston Spa, N. Y., Danversport, Mass., Peabody, Mass., and Woburn, Mass., to Philadelphia, Pa.

(Respondent by its counsel objected to the question as to the intentions of the relator in connection with the defense of complaint against it before the Commission to which the statement in the above paragraph is in substance the answer of the witness, and to said answer, as incompetent, irrelevant and immaterial, which objection being overruled by the court the respondent duly excepted.)

It is my understanding that the Delaware and Hudson does not participate in the transportation or rates com-

plained of in the shipper's petition before the Commission, between any points mentioned in that petition, except those which I have just stated. It is therefore, not concerned with the proof of the allegations of the petition with respect to such transportation or rates or any defense that may be made as to them.

(The respondent by its counsel objected to the question of relator's counsel relative to the witness' understanding as to relator's participation in transportation or rates and relator's concern in proof or defense before the Commission, to which the statements in the above paragraph are answers; and to the answers of the witness, as incompetent, irrelevant and immaterial, and as being hearsay and an improper and unwarranted statement of the conclusion of the witness; which objection being overruled by the court, the respondent duly excepted.)

If the complaint as to all of the rates mentioned in paragraph VI of the petition before the Commission is heard and determined in that proceeding, The Delaware and Hudson will thereby be put to greater trouble, expense, hardship and burden than if the rates with respect to the points which I have stated The Delaware and Hudson intends to defend on, were heard separately. In the first place, the hearing would consume a greater amount of time than it would if confined to the issues raised in the complaint against rates in which The Delaware and Hudson Railroad Corporation is a party. It would cover a wider range of evidence and would result in a record which would be much more difficult to examine in an intelligent manner, with a view to presenting a proper brief, than would be true if confined to issues involving the rates in which The Delaware and Hudson Railroad Corporation does participate. As I stated, such a hearing would require additional time and thereby increase my own time consumed at such hearing and the expense to the company in the interference with my other duties as well as the duties of other officers and employees of the corporation.

If a consolidated hearing is held I would regard it as necessary either for myself or some other counsel
51 for The Delaware and Hudson Railroad Corporation to be in attendance continuously at that hear-

ing, to see whether the evidence that came in might have any bearing upon matters in which my corporation was interested. It has been my experience that that is the situation that is required to properly protect our interests.

(The respondent by its counsel objected to the questions of relator's counsel relative to burden and expense to the Delaware and Hudson involved in the defense of the complaint before the Commission, and to the answers of the witness set forth in substance in the two paragraphs hereinabove, as incompetent, irrelevant and immaterial; which objections being overruled by the court the respondent by its counsel duly excepted.)

Cross-examination.

By Mr. Thomas:

I have not made an examination in detail of the defendant railroads which are named in this complaint before the Commission to determine how many different carriers participate only in certain groups of rates, but my information as to the extent of the participation of The Delaware and Hudson Railroad Corporation in the rates involved in this complaint has been gained by collaboration with our traffic department. If The Delaware and Hudson Corporation is to have rates in which it admits it is interested, separated, segregated, severed and heard separately from the others, I imagine there would be some other railroad companies which would be entitled to a similar privilege because, as the previous witness testified, there are certain points of origin here, the rates from which to
52 Springdale or Philadelphia apply over carriers and via routes which would not involve The Delaware and Hudson Railroad Corporation.

I have testified that the time of The Delaware and Hudson Railroad Corporation and of its representatives, including its lawyers, would be longer if the complaint as presented to the Commission is heard as a unit, rather than being divided. I cannot speak for the complainant whether, if the case were segregated and severed and a separate hearing were had as to each of those, the aggregate of time required for the complainant to present its case before the

Commission would, in all probability, be greatly more than the aggregate of time taken and consumed in presenting its case as a whole. I am able to testify with regard to the amount of time which The Delaware and Hudson would be required to consume. In my experience in hearings before the Commission I cannot say that if each one of these sets of rates were split up and a separate hearing given to each one, the aggregate of time required of the shippers would be very much more than that which would probably be required to present its complaint as a unit to the Commission. In fact, it has been my experience, and it would probably be true in this case, that with a more clearcut issue, with the case confined to a more narrow issue as we are seeking here, it would expedite the proceeding for the complainant as well as for the defendants. I think this would be true in the aggregate of cases. It might be a conclusion that if the Commission had to segregate each set of rates, such as we contend should be done here, and assign each to a separate hearing, that the time of the Commission and its examiners would be very much increased over that which is consumed under the present practice. But my actual

53 experience has been as I have stated, and I can cite a concrete illustration. In I. C. C. Docket 23347, sub-numbers 1 and 2, which were complaints brought by the Brunswick Balke Collander Company and others against a number of carriers, involving rates on slate slabs from the slate regions in Pennsylvania on the Lackawanna Railroad and one or two others, to Muskegon, Mich., Chicago, Ill., and other points in that territory, the same complaints brought in issue the rates on slate from the Vermont region on the Delaware and Hudson Railroad. In that case the Delaware and Hudson filed a motion with the Commission that those issues be severed. That motion was denied and a hearing was had, and I was required to attend that hearing with witnesses. It occurred in July, 1930—July 14th and 15th, 1930. That resulted in a record of 332 pages of testimony and some 75 exhibits, in only about one-third of which the Delaware and Hudson had any interest whatever, and I and my witnesses were required to sit through that hearing for two days.

Coming to your point, it was my experience in that case that if our portion of the complaint, in which we were interested, that is, the Delaware and Hudson could have been

heard separately, it would have been tried and disposed of in an hour; an hour for each side would have been ample. We would have had a much more concise record and there would have been less time, for all parties concerned. I could not say that the aggregate of time consumed in determining a complaint made in this case before the Commission would be very much more if each set of rates, in which each particular defendant carried admits it has an interest, were segregated and tried separately from all of the rest.

(Witness excused.)

54 The Commission offered in evidence a certified copy, certified under the seal of the Commission's Secretary, of the answer of The Delaware and Hudson Railroad Corporation filed before the Commission in the American Glue case, No. 79212. The certified copy of the answer above referred to was received in evidence and marked respondent's exhibit No. 1 and was in words and figures as follows:

Answer of Delaware and Hudson Railroad Corporation.

This defendant denies that its rates are unjust and unreasonable in violation of Section one (1) of the Interstate Commerce Act wherefore it prays that this complaint be dismissed and no reparation granted in so far as it is concerned.

The Commission offered in evidence a copy of a pamphlet entitled "Rules of Practice before the Commission", published under the authority of statute by the Interstate Commerce Commission, which said rules are not copied herein but are a subject of the attached stipulation.

(Testimony concluded.)

Endorsed on cover: District of Columbia Supreme Court. No. 5389. The United States of America ex rel. The Delaware and Hudson Railroad Corporation, appellant, vs. Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Apr. 17, 1931. Henry W. Hodges, Clerk.